No. 95-73 (6)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF REALTORS®, AND THE NATIONAL REALTY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Association of Home Builders, the National Association of Realtors®, and the National Realty Committee respectfully file this brief as *amici curiae* in support of Petitioners. Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The consent letters have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") represents 185,000 builders and associate members (*e.g.*, land planners, land developers, industrial developers) organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. The National Association of Realtors® ("NAR") is a not-for-profit professional association comprised of approximately 712,000 persons engaged in all phases of the real estate business. Its members include real estate brokers, managers, appraisers, counselors, and a variety of other participants in the real estate market. The National Realty Committee ("NRC") serves as a roundtable in Washington, D.C. on national policy issues affecting real estate owners, advisors, builders, investors, lenders, and managers.

NAHB, NAR, and NRC members are involved in the development of myriad projects throughout the country and, as a result, have substantial collective experience with federal regulation of waters of the United States. Accordingly, NAHB, NAR, and NRC believe they can assist the Court in obtaining an additional perspective on the issue presented in the underlying case. Because the policy challenged in this case restricts the development potential of vast areas of land—and therefore the value of that land—this Court's resolution of the issue presented would be of great significance to NAHB, NAR, and NRC's members and other similarly situated developers and landowners.

SUMMARY OF ARGUMENT

This case concerns the validity of a federal agency theory of jurisdiction that has injected the awesome power of the federal government into the humble realm of local land use planning. Section 404 of the Clean Water Act ("Act") empowers the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") to regulate the discharge of dredged and fill material into waters, including wetlands, the use, degradation or destruction of which could affect commerce. Under the Corps' and EPA's "migratory bird test," a wetland or "other water" is deemed to have a sufficient effect on commerce to trigger federal jurisdiction if the wetland or water could be used by migratory birds that cross state lines. Because the Corps defines wetlands and waters broadly—an area can be dry at the surface year in and year out and still qualify as a "wetland"—and because all places on earth are susceptible to bird use (actual use is not required), the bird test brings into federal jurisdiction many shallow depressional areas that would otherwise be managed without federal involvement.

The question before this Court is whether the validity of the migratory bird test is a matter of sufficient importance to merit the Court's attention. Some figures may help put the issue in perspective. Earlier this year, the Corps did a study to determine the number and acreage of isolated wetlands that are less than one-half acre in size. These small, remote areas are unlikely to possess other characteristics that might establish a Commerce Clause nexus (*e.g.*, they are not likely to be frequented by out-of-state visitors). Thus, they will or will not be subject to federal authority depending on whether the bird test is sustained.

The study found that there are about 8,309,502 discrete isolated "wetlands," averaging one-quarter acre in size, scattered across 1,836,469 acres of the American landscape. This acreage is just one-tenth of one percent of the two-billion-acre surface area of the continental

United States, but the absolute number suggests that a multitude of citizens and local governments are affected by the migratory bird test. With the test, eight-million-plus tiny low spots will be subject to federal regulation because they "could" be used by birds. Without the test, the federal government would still regulate the vast majority of wetlands (approximately 104 million acres) and other waters (about 34 million acres), but it would not reach these eight million spots. They would be regulated, or not, by the numerous states and more than 5,000 local governments that already have laws in place to protect wetlands.

The migratory bird test is therefore of critical importance to any person who wants to use or develop property that includes a tiny depressional area. It is also important to state and local officials who are attempting to develop coherent land use plans because it gives the federal government eight million quarter-acre chances to override land use decisions that traditionally have been the province of the states.

The bird test is wrong for two principal reasons: first, because Congress did not intend to reach these tiny, remote areas when it passed the Clean Water Act, and second, because the Commerce Clause does not empower the federal government to assert authority over discrete isolated areas based solely on potential bird use.

As to congressional intent, neither the statute nor the legislative history mention isolated areas such as are at issue here. Nor is there any suggestion that Congress intended to displace traditional state authority in the land use area. In other cases where the Court has confronted broad federal claims that would upset the traditional federal-state balance, the Court, to preserve our federalist system, has declined to infer broad congressional intent and instead has required a "clear statement" that Congress understood the federalism implications of its actions and intended them to occur. Here, there is no such clear statement. Instead, there is ample evidence that Congress

respected and wanted to preserve existing state authority over resources within state borders.

In addition, the Commerce Clause does not authorize Congress to regulate isolated waters based solely on the potential presence of migratory birds. Migratory birds themselves have no effect on interstate commerce, let alone the substantial effect required by *United States v. Lopez*, 115 S. Ct. 1624 (1995).

While it may theoretically be possible to establish, on a case-by-case basis, a legitimate link between a particular isolated water's use, degradation or destruction and interstate commerce, the migratory bird test does not do it. The test is analytically unsound because the premise leapfrogs the conclusion. Under the government's approach, the potential presence of birds establishes, *ipso facto*, that any use of the water will affect commerce. No effort is made to show how bird use results in an effect on commerce; it is just assumed. The migratory bird test is also defective because it utterly disregards the traditional land use planning authority of state and local governments. Finally, the issue has divided the courts of appeals, with the result that federal jurisdiction is determined differently depending on where property is located.

ARGUMENT

I. THIS CASE WARRANTS SUPREME COURT REVIEW BECAUSE IT RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT AFFECTS THE USE OF MILLIONS OF ACRES AND HAS BEEN RESOLVED DIFFERENTLY BY THE COURTS OF APPEALS.

This case involves the issue left unresolved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985): whether the Corps has authority under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1994), to regulate isolated waters that are not adjacent to and have no connection to navigable waters. In the case below, the Ninth Circuit held that a previous panel

of the court was not "clearly wrong" in holding that the Corps' regulatory jurisdiction under the Act extends to isolated waters simply because such areas "may" be used by migratory birds. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394-96 (1995).

Without any minimum requirements as to size, type or frequency of use, or type of bird, the consequence of the Ninth Circuit's decision is to sweep countless isolated areas into federal jurisdiction without regard to the areas' value in promoting water quality, their real effect on interstate commerce, or even their significance to migratory birds. The decision allows the government to convert a homeowner's backyard or a high school's baseball diamond into a federal fief that is "no longer subject to control or improvement by the owner without [federal] government permission." *United States v. Larkins*, 852 F.2d 189, 194 (6th Cir. 1988) (Merritt, J., concurring). Because the migratory bird test trenches in ill-considered fashion on our Nation's federalist system and affects millions of landowners in the process, the question as to its validity is of significant national importance. Accordingly, the question should be decided by the Supreme Court.

* * *

Under Section 404, a person must obtain a permit from the Corps in order to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344. The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Corps and EPA, who administer the program jointly, have issued regulations that define "waters of the United States" as including "all *other waters* . . . [including wetlands] the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3 (a)(3) (1994) (emphasis added); 40 C.F.R. § 230.3 (s)(3) (1994) (same). The regulations state that the requisite effect on commerce may be established if an area is used by interstate travelers for recreational or other purposes; or if fish or shellfish could be taken from

the area and sold in interstate or foreign commerce; or if the area is used or could be used for industrial purposes by industries in interstate commerce. *Id.* In the preamble to its 1986 regulations, the Corps suggested that the required Commerce Clause nexus could also be established by a showing that the waters "are or would be used as habitat by . . . migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (1986). This explanatory language has come to be known as the "migratory bird test."

A. This Case Warrants Supreme Court Review Because the Migratory Bird Test Affects Millions of People and Interferes with Traditional State and Local Control over Land Use Decisions.

In determining whether to assert jurisdiction over a parcel of land, the Corps determines, first, whether the area meets the technical criteria to qualify as a "wetland" or as any other type of "other water," and second, whether use of the "wetland" or "other water" has the kind of effect on interstate commerce that would transform the area into a jurisdictional "water of the United States." *See* 33 C.F.R. § 328.3(a)(3).

One of the two principal categories of "other waters" is open bodies of water such as rivers, lakes, and ponds. The Corps has expanded this category to include areas that—unlike lakes and rivers—rarely contain water. *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (dry arroyos). The other principal category of "other waters" is "wetlands." *See* 33 C.F.R. § 328.3(a)(3), (b). Under the Corps' wetlands delineation guidelines, an area can be completely dry at the surface 365 days a year, year in and year out, and still qualify as a wetland. *See* Environmental Laboratory, Dep't of the Army, Technical Rep. Y-87-1, *Corps of Engineers Wetlands Delineation Manual* 34-41 (Jan. 1987). Artificial areas, such as farm ponds, are not excluded, nor is there a minimum size requirement for areas to warrant federal oversight. Indeed, a recent study found

that fifteen percent of Section 404 individual wetland applications processed by the Corps in 1992 had wetlands impacts that were less than one-tenth of an acre. Half of the wetland applications involved impacts that were 1.1 acre or less.[1]

A study conducted by the Corps in 1995 documents the importance of the migratory bird test in establishing federal jurisdiction over tiny, remote areas. The study was undertaken to determine the number and acreage of isolated wetlands in the United States that are less than one-half acre in size. As a general matter, these areas tend to be too small to support the indicia of interstate commerce contained in the agencies' formal regulations: they are not likely to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes by industries in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3)(i)-(iii); 40 C.F.R. § 230.3(s)(3)(i)-(iii). Thus, the only way the federal government can reach these areas is through the bird test.

The Corps' study did not include data from seven states within the continental United States (Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, and West Virginia). In addition, it did not include any isolated wetlands that are one-half acre or larger, nor did it include "other waters" that are not wetlands, such as the seasonal ponds on the Leslie Salt property. Even with these omissions, the Corps' census reports that there are 8,309,502 discrete isolated depressional areas that meet the federal wetlands definition scattered across 1,836,469 acres of the American landscape. U.S. Army Corps of Eng'rs, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995) [hereinafter *1995 Corps Data Forms*]. The average size of these low spots is one-quarter acre. Although the total acreage covered by these tiny areas is less than one-tenth of one percent of the surface area of the continental

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[1] Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* 20, 22 (Feb. 1994).

United States (about two billion acres), *see* Thomas E. Dahl, U.S. Fish & Wildlife Serv., *Wetlands Losses in the United States 1780's to 1980's* tbl. 1 (1990), the high absolute numbers (more than eight million separate spots) suggest that many, many citizens are affected by the bird test. But from the federal perspective, it is not that significant: without the test, the federal government would continue to regulate the vast majority of wetlands (approximately 104 million acres) and other waters (about 34 million acres), *see id.*, but it would no longer reach these minuscule low spots in the middle of cornfields.

Every one of the eight million areas identified in the Corps' study, and innumerable "other waters" as well, is susceptible to migratory bird use.[2] Birds travel throughout the Western Hemisphere and may potentially use any land or water in the United States. In one study, for example, birds marked in North Dakota were recovered in forty-six states, ten Canadian provinces and territories, and twenty-three other countries.[3] In addition, actual "use" by birds is not even required; potential use is sufficient. Nor is there a minimum standard for kind or frequency of use. A single landing will suffice, as will any kind of migratory bird: nonwater-dependent species such as robins and wrens are treated identically to waterfowl.

Given these facts, the consequences of the Ninth Circuit's decision are profound. It is hornbook law that the regulation of land is a traditional prerogative of state and local government. *See FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"). Because areas that meet the federal definitions of isolated waters and wetlands are scattered throughout the landscape, state and local land

[2] *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service).

[3] *See* U.S. Fish & Wildlife Serv., *Wetlands of the United States: Current Status and Recent Trends* 1 (1984).

use controls necessarily regulate the use of those areas. *See, e.g., Saturley v. Town of Hollis*, 533 A.2d 29, 31-32 (N.H. 1987); *cf. Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858, 862-65 (Mass. 1979).

But by using the migratory bird theory to claim jurisdiction over intrastate property, the federal government has displaced traditional state authority over land use. Eight million low spots are now controlled by the federal government because they "could be used" by birds. Without the test, these areas would be regulated, or not, by the states. In fact, many states, and over 5,000 local governments, have laws in place to protect wetlands.[4] But state and local governments are powerless to implement their own land use regulations unless and until the federal government "signs off" on them. This insidious requirement

[4] For a sampling of state statutes that regulate isolated waters and wetlands, see Conn. Gen. Stat. §§ 22a-36 to -45 (1994); Fla. Stat. Ann. §§ 373.414-.421 (West 1995); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -U (West 1994); Md. Code Ann., Nat. Res. §§ 8-1201 to -1209.1 (1994); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (West 1994); Mich. Comp. Laws § 281.701-.722 (1994); Minn. Stat. § 103G.222-.2242 (1994); N.H. Rev. Stat. Ann. § 482-A:1-:27 (1994); N.J. Rev. Stat. § 13:9B-1 to -30 (1994); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1301 (Consol. 1994); Pa. Stat. Ann. tit. 25, § 105.17 (1993); R.I. Gen. Laws §§ 2-1-18 to -24 (1994); Vt. Stat. Ann. tit. 10, § 1272 (1994). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42; Fla. Stat. Ann. § 373.421; Me. Rev. Stat. Ann. tit. 38, § 480-F; Md. Code Ann., Nat. Res. § 8-1204; Mich. Comp. Laws § 281.708; Minn. Stat. § 103G.2242; N.Y. Envtl. Conserv. Law § 24-0501; R.I. Gen. Laws § 2-1-21. For a sampling of local government ordinances or by-laws regulating isolated waters and wetlands, see Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); *see also Hearings on S. 1304 Before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), *available in* LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

alters the traditional balance between governments, to no good purpose.

As an illustration of the unprecedented reach of the federal program, consider that the State of Georgia currently has within its borders about 240,000 isolated wetlands that are each less than one-half acre in size. *See 1995 Corps Data Forms.* This means that the federal government has, *by virtue of the bird test alone*, 240,000 opportunities to insert itself into purely local land use decisions on such pedestrian concerns as the siting of grocery stores, elementary schools, and subdivisions.[5]

Furthermore, the Section 404 permitting process requires a significant commitment of resources. In 1992, for example, approximately 100,000 parties either applied for individual Section 404 permits or sought to qualify for general permits. For those who pursued an individual wetland permit, it took an average of 373 days to traverse the process. Moreover, for every year since 1989, the majority of permit applications have ended up being "withdrawn," which in most cases has meant that the project cannot proceed.[6] With results like these, it is no wonder that the 185,000 members of the NAHB have placed wetlands regulation among their top five "critical" concerns for eighteen of nineteen consecutive quarterly reporting periods over the last five years.

In short, the bird test burdens landowners, intrudes on state officials, and adds little environmental value. It is therefore as superfluous as it is imperious.

B. Supreme Court Guidance Is Required To Resolve This Important Issue That Has Divided the Courts of Appeals.

The migratory bird test has divided the three courts of appeals—the Fourth, Seventh, and Ninth Circuits—that

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[5] The same is true in all the states—*e.g.*, New Hampshire has 60,482 such areas; Oregon, 196,389; South Carolina, 153,147. *See 1995 Corps Data Forms.*

[6] Albrecht & Goode, *supra* note 1, at 15, 24.

have reviewed the issue. This division is an independent basis for Supreme Court review of the test.

The Seventh Circuit first held that Congress did not intend to reach isolated wetlands and that the assertion of jurisdiction over such areas went beyond Congress' Commerce Clause power. *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310, 1316 (7th Cir.), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *administrative order for penalties vacated*, 999 F.2d 256 (7th Cir. 1993). Upon rehearing, two of the judges on the panel declined to address the constitutional and statutory issues and instead held that the "regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial" and that "the regulation . . . allow[s] migratory birds to be that connection." *Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 261 (7th Cir. 1993). The third judge concurred in the outcome but on the basis of the statutory and constitutional infirmities laid out in the original opinion. *Id.* at 262-63 (Manion, J., concurring). The Ninth Circuit, by contrast, held that the Corps does have power to assert jurisdiction over isolated waters because migratory birds use or could use those areas.[7] *Leslie Salt*, 55 F.3d at 1394-95.

The Fourth Circuit, however, did not reach the merits of the issue, holding instead that the migratory bird policy is a "substantive rule" that is invalid because it was not promulgated in accordance with the notice-and-comment provisions of the Administrative Procedure Act. *See Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

As a consequence of the *Tabb Lakes* decision, the Corps and EPA no longer apply the migratory bird test in the states of the Fourth Circuit, but they continue to

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[7] In so holding, the Ninth Circuit misconstrued the Seventh Circuit's holding in *Hoffman Homes* as a decision on the Commerce Clause issue, when in fact it was a much narrower decision on the regulation. *Compare Leslie Salt*, 55 F.3d at 1393-95 *with Hoffman Homes*, 999 F.2d at 261.

apply the test outside those states. This differing application of the reach of Section 404 lacks any legal or equitable basis and warrants resolution by the Supreme Court.

II. CONGRESS DID NOT INTEND TO CLAIM JURISDICTION OVER ISOLATED WETLANDS AND WATERS BASED SOLELY ON POTENTIAL BIRD USE.

A. Congress Intended To Expand Federal Authority but Never Contemplated Federal Regulation of Isolated Waters.

There is no question that Congress intended the Act to reach further than had earlier federal water pollution control statutes. As the government is fond of noting, the Conference Report accompanying the 1972 legislation stated that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Because pollution that enters the system at point *A* can travel across state lines through interconnected waterways to point *B*, Congress decided "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (emphasis added) (upholding the government's authority to regulate adjacent wetlands). The key jurisdictional fact was the waters' interconnection, not their navigability.

But neither the statutory language nor the legislative history suggest that Congress wanted to regulate all, or even some, isolated waters. The 1972 debate was carried on in terms of lakes, rivers, and oceans; in 1977 some concern was expressed about adjacent wetlands because they help cleanse adjacent waterways. *See, e.g., Hearings on H.R. 3199 Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 377-78 (1977). But there was not a mention of isolated waters.

The Corps and EPA have agreed that the Act does not reach all wetlands and waters. The government has argued in litigation that "Congress did not automatically include every waterbody, however isolated, within the coverage of the Act." Memorandum in Support of Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 50, *National Wildlife Fed'n v. Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) (No. G-86-37) [hereinafter Laubscher Brief]. Therefore, "small, isolated wet areas may not be waters of the United States . . . because . . . their destruction or degradation would not have an effect on interstate commerce." 45 Fed. Reg. 33,290, 33,398 (1980). Indeed, the Corps has recognized that a regulatory program that reached every isolated waterbody would be "unreasonable over-regulation." Laubscher Brief at 58.

The government still *says* that it does not regulate all waters, but rather only waters the use or degradation of which would affect commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). But with migratory birds as a stand-in for the commerce nexus (an approach we believe violates the Commerce Clause), there are no waters whose use does not affect commerce. In short, the bird test subverts Congress' intent, which was to reach "at least some" waters that are not navigable, *Riverside Bayview*, 474 U.S. at 133, but not all of them.

B. Absent a "Clear Statement" from Congress, the Court Should Not Construe the Act To Alter the Federal-State Balance in Land Use Regulation.

As discussed above, the migratory bird test effects a massive intrusion of federal power into land use decisions that by tradition are the province of the states. Accordingly, to preserve the integrity of our federal system, the Court should not construe the statute to allow this intrusion unless it is absolutely clear that that is what Congress intended. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). In this case, it is not.

Indeed, Congress was at pains to preserve the authority of state government. Section 101 of the Act states specifically:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b) (1994). In furtherance of this policy, Congress declined to extend regulation to many known sources of water pollution—*e.g.*, runoff from agricultural and silvicultural operations and nonpoint source pollution associated with construction and mining activities. Similarly, Congress excluded groundwater from the Act's regulatory program because including it would have involved the federal government in complex state jurisdictional rules. S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). But to complement the mandatory regulatory programs that would be administered by federal agencies under Sections 402 and 404 of the Act, Congress enacted Section 208 to encourage the states to develop area-wide management plans that would address the pollution sources not regulated by federal law. Thus, Congress struck a careful balance, exerting federal regulatory authority where necessary to protect the federal interest in the health of the "navigable waters," encouraging a voluntary federal-state partnership in areas beyond the reach of federal authority, and preserving state authority in all other spheres.

The migratory bird test eviscerates this careful balance, extending federal authority to at least eight million tiny, discrete "waterbodies," most of which would otherwise be controlled exclusively by state or local decisionmakers. Under our federal system, the Court will not allow this result unless it is clear that Congress considered and intended, when it passed the Act, to alter the traditional balance between the federal and state governments. This "clear statement rule" applies "in cases implicating Con-

gress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 115 S. Ct. 1624, 1655 (1995) (Souter, J., dissenting).

As the Court explained in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), "our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . [in which] 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.'" *Id.* at 457 (quoting *Texas v. White*, 68 U.S. (7 Wall.) 700, 725 (1868)). The premise of the system is that with two governments vying for authority, the risk of tyranny or abuse from either is reduced. But "[t]hese twin powers will act as mutual restraints only if both are credible," *id.* at 459, and only if the citizen knows which government should be held accountable if a given function is not performed properly. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, such as its power under the Commerce Clause, the Supremacy Clause allows Congress to trump state law, even in areas such as land use that by tradition fall within the state sphere. But under the "clear statement" principle, the Court will not simply assume that Congress has used its power to override state authority. Rather, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).[5] Mere ambiguity will not suffice. *Gregory*, 501 U.S. at 464.

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[5] The federalism principles that constrain Congress when it acts pursuant to its Commerce Clause authority are not as powerful when Congress legislates to enforce the Civil War Amendments. This is so because the very purpose of the Civil War Amendments was to intrude on state sovereignty. *Gregory*, 501 U.S. at 468; *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983).

Here, there is no evidence that Congress intended to alter the federal-state balance with respect to isolated waters and plenty of evidence that it did not. Accordingly, the migratory bird test cannot survive the clear statement rule.

III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO REGULATE ISOLATED DEPRESSIONAL AREAS BASED SOLELY ON THE PRESENCE OF MIGRATORY BIRDS.

Although congressional power under the Commerce Clause is sweeping, it is not limitless. *Lopez*, 115 S. Ct. at 1632. This Court exercises great restraint when reviewing congressional judgments regarding what affects interstate commerce,[9] but ultimately it is the responsibility of the Court to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The idea that the law authorizes the federal government to "regulate puddles merely because a bird traveling interstate might decide to stop for drink" [10] is untenable and should not be sustained.

This Court has identified three factors to balance in determining whether Congress may regulate an intrastate activity under the Commerce Clause: (1) whether the intrastate activity is economic; (2) whether the statute in question sets forth a case-by-case "jurisdictional element" ensuring that a substantial connection to interstate commerce will be demonstrated each time federal law is applied to the intrastate activity; and (3) whether and to what extent the federal regulation encroaches upon an area of law traditionally left to the states. *See Lopez*, 115 S. Ct. at 1630-32. Taking these factors into account, the migratory bird test cannot sustain the federal regulation of isolated wetlands or waters.

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[9] Of course, such restraint is unnecessary when, as here, the constitutional judgment has been made by an administrative agency, not Congress.

[10] *Hoffman Homes v. Administrator*, 999 F.2d 256, 263 (7th Cir. 1993) (Manion, J., concurring).

A. The Activity Regulated by the Statute, *i.e.*, the Discharge of Dredged or Fill Material into Navigable Waters, Is Not Necessarily an Economic Activity.

If the intrastate activity subject to regulation is an economic activity, then it is more likely than a noneconomic activity to affect interstate commerce. *See id.* at 1630. Here, the activity being regulated is the "discharge of dredged or fill material," which may or may not be "economic." The Corps authorizes approximately 100,000 activities a year,[11] ranging from the planting of rose gardens to the development of shopping centers. Many permit applicants are individuals and families constructing or making improvements to their own homes. *See* 60 Fed. Reg. 38,650 (1995). These domestic undertakings are not "economic," nor are they the kinds of matters that typically trigger regulation by the federal government. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat sales).

The government's recent redefinition of the term "discharge of dredged material" has subjected even more noneconomic activities to federal authority. For example, the agencies have noted that walking, bicycling, or driving a vehicle through a wetland will cause a "discharge of dredged material." 58 Fed. Reg. 45,008, 45,020 (1993).[12] Surely, riding a mountain bike, even through a wetland, is not an "economic" activity.

In sum, the most that can be said about the economic character of the discharge of dredged or fill material is that it is problematic. Certainly, it is not *always* economic. This means that in any given case the government risks

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[11] *See, e.g.*, U.S. Army Corps of Eng'rs, Regulatory Branch, *Section 404 of the Clean Water Act and Wetlands Special Statistical Report* 5-6 (July 1995).

[12] Magnanimously, the government has declined to regulate these activities for now. *See* 58 Fed. Reg. at 45,020.

regulating something that is utterly unrelated to interstate commerce. Therefore, the question becomes whether the potential defect in the regulation is cured by a "jurisdictional element." We turn to that issue below.

B. The Migratory Bird Test Subverts the Requirement That the Interstate Commerce Connection Be Determined Case-by-Case.

A federal statute regulating noneconomic, intrastate activities may nonetheless satisfy the Commerce Clause if it contains a "jurisdictional element" ensuring that the requisite connection to interstate commerce will be established on a case-by-case basis. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 violated the Commerce Clause because the statute regulated a noneconomic activity (the possession of firearms) and because the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *See Lopez*, 115 S. Ct. at 1631.

Here, of course, the regulations on their face appear to contain the jurisdictional element required by *Lopez*. Federal power extends to wetlands and waters *only* if their use "could affect interstate or foreign commerce." *See* 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). The migratory bird test subverts the case-by-case requirement, however. Under the test, the presence of birds establishes, *ipso facto*, that the destruction of the wetland will substantially affect commerce. This is a *non sequitur*.

What is more, although the government *says* that some wetlands are subject to federal control and others are not, its test does not distinguish the federal from the nonfederal. Every place on earth is subject to potential bird use. No place is ruled out because the bird test does not require any particular kind of bird, or bird use, or any particular number of birds. A single bird, or even a potential bird, will suffice. So no place fails the test and no place that meets the federal definition of a wetland or a

water is not regulated. A "test" that distinguishes jurisdictional areas from nonjurisdictional areas based on potential bird use is no test at all.

C. The Migratory Bird Test Intrudes, Without an Economic Justification, on an Area Traditionally Left to the States.

If federal regulation premised on tenuous connections to commerce extends, unchecked, into areas traditionally sovereign to the states, the Commerce Clause will be transformed into a general police power that could be used to regulate every aspect of human existence. *Lopez*, 115 S. Ct. at 1634. Federalism principles require that the Court intervene to prevent this result. *See id.* at 1639 (Kennedy, J., concurring).

Once again, there are no "bright and clear lines." *Id.* (Kennedy, J., concurring). The extent to which the area of regulation is the province of the states must be considered, as well as the extent to which the regulated activity is connected to commercial concerns. For example, in *Lopez*, the firearm possession statute infringed the states' authority to regulate both education and criminal law. By passing a statute regulating the possession of guns in schoolyards, Congress had foreclosed the states from experimenting with "other, more practicable means to rid the schools of guns," even though both criminal law and education are areas "to which States lay claim by right of history and expertise." *Id.* at 1641 (Kennedy, J., concurring). As Justice Kennedy observed, simple possession of a firearm does not constitute commerce "in any ordinary and usual sense of that term." *Id.* (Kennedy, J., concurring). Because the intrusion on state sovereignty was significant, and the purported commercial nexus was not, the statute was found to have overstepped the bounds of the Commerce Clause. *Id.* at 1633.

Like criminal law and education, land use regulation is indisputably a state activity. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). The migratory bird test

brings eight million depressional areas, averaging one-quarter acre in size, into federal jurisdiction. For every one of these eight million areas, state and local governments must subordinate their own land use decisions to the federal government's Section 404 program. In addition, because the migratory bird test brings virtually *all* isolated wetlands and waters into federal jurisdiction, states are hindered in their ability to experiment with different types of wetland protection programs. This intrusion into state land use regulation, in the absence of a substantial link to interstate commerce, cannot be justified under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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